



## **DEPARTMENT OF LABOR**

### **Revised Final Tribal Consultation Policy**

**AGENCY:** Office of Congressional and Intergovernmental Affairs (OCIA), Department of Labor.

**ACTION:** Final policy; Response to comments on proposed policy.

**SUMMARY:** The Department of Labor (DOL) is issuing its revised final Tribal Consultation Policy. The Tribal Consultation Policy (hereinafter referred to as the “policy”) establishes standards for improved consultation with federally recognized Indian Tribes to the extent that no conflict exists with applicable Federal laws or regulations. The policy applies to any Department action that affects federally recognized Indian Tribes and requires that the Department's government-to-government consultation involve appropriate Tribal and Departmental Officials. These revisions are set forth as the final policy in response to comments from the April 14, 2021, Tribal consultation meeting.

**DATES:** This Revised Final Policy is effective October 10, 2023.

**FOR FURTHER INFORMATION CONTACT:** For information on the Department of Labor's (DOL) Tribal Consultation Policy, contact Jack Jackson, Tribal Liaison, Office of Congressional and Intergovernmental Affairs, [Jackson.Jack.C@dol.gov](mailto:Jackson.Jack.C@dol.gov), (202) 431-7710. Individuals with hearing or speech impairments may access the telephone via TTY by calling 7-1-1 Federal Relay Telecommunications Access.

### **SUPPLEMENTARY INFORMATION:**

#### **I. Discussion of Comments on the Proposed Draft Tribal Consultation Policy**

On April 14, 2021, the Department conducted a Tribal Consultation meeting and received comments from a broad spectrum of interested parties representing Indian Tribes, Alaska Native Corporations, and tribal advocacy groups. They raised a variety of concerns with

specific provisions of the proposed policy. After reviewing these comments thoughtfully and systemically, the Department has updated several provisions of its policy. Comments related to the following provisions are discussed in detail below.

#### **A. Section I— Streamlining Tribal Consultation Policy**

Several commenters proposed adopting a uniform tribal consultation policy that broadly and consistently applies to agencies. One commenter suggested using the Department of the Interior's (DOI) Tribal Consultation Policy as a starting point, as DOI engages with Tribal Governments more frequently than most other agencies. Another commenter recommended that DOL and DOI work together to revive the Native One-Stop resource for tribes and tribal organizations that was initiated during the Obama Administration and to ensure that it is sustainable into the future.

The Department continues to engage with the White House Council on Native American Affairs to seek guidance and recommendations for tribal consultation and engagement. During the 2022 Tribal Nations Summit, the DOI Secretary announced the launch of the first Secretary's Tribal Advisory Committee (STAC). The goal of the committee is to facilitate intergovernmental discussions and modernize DOI's tribal consultation plan. The STAC is comprised of a primary representative and alternate member from each of the 12 Bureau of Indian Affairs (BIA) Regions. The Department will request to engage with the committee on DOL related policy and guidance with tribal implications.

Additionally, on November 30, 2022, President Biden signed the Presidential Memorandum on Uniform Standards for Tribal Consultation, which establishes uniform minimum standards to be implemented across all agencies regarding how tribal consultations are to be conducted. The Department continues to work with our Federal agency partners and the White House Council on Native American Affairs to improve and streamline the consultation process for both tribes and Federal participants, and

ensure more consistency in how agencies initiate, provide notice for, conduct, record, and report on tribal consultations.

Regarding reviving the Native One-Stop, the Department recommends tribes utilize the Career-One Stop website at <https://www.careeronestop.org/> to find employment opportunities in their local area. The site is owned by DOL and is updated nightly.

Another commenter suggested that OMB provide a standardized set of basic regulatory consultation standards that apply across all Federal agencies, in order to provide a minimum standard baseline that all tribes could rely upon regardless of what agency they are interacting with. This should include a provision that OMB can determine whether a consultation conducted by an agency meets the standard established by E.O. 13175.

The Department notes that OMB has established a set of nine specific consultation standards which DOL incorporated in its policy.

A commenter recommended the creation of consultation policies that persist from administration to administration, so that tribes do not have to repeat their consultation feedback to every new administration.

The Department agrees and notes that the 2012 Tribal Consultation Policy published in the Federal Register serves as the foundation for the Department. It is a best practice for each new administration to consult with tribal officials on proposed policies and guidance that have tribal implications. Just as the White House administration changes, so does the leadership of tribal nations. Therefore, it is necessary to periodically request feedback from tribal officials. Consultation and feedback from tribal officials are key to the implementation and success of new initiatives.

A commenter suggested cooperating with other Federal agencies where tribal issues overlap, so that tribes do not have to work individually with multiple agencies. For example, DOL should meet with the Treasury and their Tribal Advisory Committee,

which is working on the need for tribal input when defining Tribal Government and commercial functions.

The Department agrees and notes that its goal is to engage and partner with Federal agencies when issues with tribal implications overlap. The DOL Tribal Liaison serves on several White House Council for Native American Affairs (WHCNAA) working groups to collaborate on implementing agency related initiatives.

A commenter proposed creating a website that would provide a cohesive platform that tribes can access that consolidates all information tribes may need including consultation policies.

The Department notes that the Department of the Interior has created a website specifically for Federal agencies to post tribal consultations and engagement meetings with tribal officials.

A commenter suggested coordinating among agencies to ensure that multiple tribal consultations are not scheduled at the same time. Consider holding consultations during tribal gatherings like conferences and summits when large number of tribal representatives are gathering.

The Department recognizes the time and resources required for one tribe to participate in simultaneous consultation sessions and notes that the WHCNAA and National Congress of American Indians (NCAI) have created websites to post tribal consultations and briefing sessions to ensure overlap does not occur. DOL looks for opportunities to participate in tribal consultations hosted by other Federal agencies and will participate in tribal consultation during conferences and summits with tribal leaders.

## **B. Section II— Definitions**

Several commenters would like the definition of consultation to be updated in accordance with E.O. 13175 and the U.N. Declaration on the Rights of Indigenous Peoples (UNDRIP). They suggested implementing a requirement of obtaining “free, prior, and

informed consent” from tribes in accordance with Article 19 of UNDRIP. Also, they ask that any stated purpose has wide consensus among tribal nations before making the policy official.

The Department follows the definition of consultation specified in Section 5 of E.O. 13175 and Section 1 of the Presidential Memorandum on Tribal Consultation and Strengthening Nation-to-Nation relationships.

### **C. Section III— Inclusion and Expectations of Involved Parties**

A commenter suggested also doing consultations with national organizations that advocate on behalf of tribes on native workforce development, such as the Native American Employment and Training Council and NCAI. However, another commenter noted that consultation with official Tribal Governments should not replace consultation with national organizations since many organizations advocate on behalf of Indian Country, but they do not represent all tribes.

The Department determines the audience prior to any session that has tribal implications. DOL agrees that consultation with tribal officials is the preferred method when policies or guidance require input on the impact it has on tribes. DOL regularly meets with its Native American Employment and Training Council Advisory Committee and considers such advisory committee meetings as additions to, rather than replacements for, consultation with Tribal Governments. From time-to-time, DOL may invite tribal officials and national organizations to participate in meetings and in consultations but will defer to tribal officials for formal comment.

A commenter would like the option for authorized proxies to speak on behalf of tribal leaders during tribal consultations. Another commenter would like tribal leaders to have the ability to include and confer with their expert staff during every consultation.

The Department values the input from tribal leaders, and we will defer to them to determine who is authorized to speak on their behalf. Tribal leaders are encouraged to

invite subject matter experts to consultation sessions to confer with them as needed. If requested, we will offer time during the session for tribal leaders to deliberate with their experts.

A commenter advised against delegating consultations to third party entities (e.g., nonprofits, corporations, hired consultants and contractors, non-tribal archaeologists and anthropologists) in order to ensure that tribal interests are not adversely impacted.

The Department agrees with this comment as our priority is to consult with tribal officials.

A commenter asks that DOL ensure that consultation includes all the Alaska Native entities that provide services to the Alaska Native and American Indian people of Alaska.

The Department uses the definition of “Indian Tribes” which includes Alaska Native Tribes and includes Alaska Native leaders when invites are dispersed.

Several commenters would like Federal officials at all levels of the consultation process to undergo training on U.S.-Tribal relations and the Federal trust obligation. The training should be designed in consultation with tribal nations. The commenters suggested hiring staff who have worked in Indian Country, engaging tribal members to help train additional staff, ensuring additional training for Federal officials most commonly involved in Tribal Government consultation, and making training materials public so that tribal nations can comment on them and offer suggestions for their improvement.

The Department notes that Section 8 of the November 30, 2022, Presidential Memorandum provides that the head of each agency must require annual training of agency employees who work with tribal nations or who work on matters with tribal implications. The new Presidential Memorandum also directs the Secretary of the Interior and the Director of the Office of Personnel Management, in consultation with tribal nations, to establish training modules regarding Tribal consultation. These modules will be available to all government employees who work with tribal nations, including agency

decisionmakers who work on any policies or programs with tribal implications. DOL will provide training and make these modules available to agency decisionmakers and staff who work with tribal nations on policies or programs with tribal implications.

Several commenters requested that high-level officials, not junior staff be involved in all consultations.

The Department makes every effort to include high-level officials (Secretary, Deputy Secretary, Assistant Secretaries, and Deputy Assistant Secretaries), and career staff who are subject matter experts to participate in tribal consultation.

Several commenters recommended creating a mechanism to ensure that tribal nations can allege violations of DOL's consultation procedures and remedies for possible violations.

The Tribes would like the right to seek judicial review of consultation when Federal Government has failed to consult appropriately.

The Department is committed to making a good faith effort to following tribal consultation procedures outlined in E.O. 13175 and the 2021 Presidential Memorandum.

#### **D. Section IV— Logistical Amendments to Tribal Consultation Process**

One commenter recommended formalizing the notice and comment period, timeline, and process in the tribal consultation plan. Specifically, they suggested publishing notice of tribal consultations in the Federal Register and transmitting official letters from Federal agencies to tribal leadership informing each Tribal Government of the date of tribal consultation, deadlines for submitting written comments, and the meeting agenda and questions to be addressed during consultation. They would like this information to be shared once the notice for tribal consultation is published, not days or hours before consultation. Another commenter requested that they are provided no less than a 30-day deadline to submit written comments after the last consultation is held.

The Department will follow the guidance outlined in E.O. 13175, the 2021 Presidential Memorandum, OMB, and the Federal Register guidance.

A commenter suggested increasing the time allotted for consultation (both the duration of sessions and number of days available in the consultation window) and initiating the process as early as possible.

The Department will determine the duration of consultation sessions based on the complexity of the proposed rule and implications the rule has on tribes.

Several commenters requested that a report be sent to all Tribal Governments at the conclusion of each tribal consultation, sharing a summary of what took place, how Tribal Government input was considered in reaching decisions, and what next steps in the consultation process look like. Justifications should be provided when Tribal Government feedback is not incorporated into the final response.

If formal consultation is based on a Notice of Proposed Rulemaking, the Department is required to have a record of tribal consultation, the written comments it received, and a response to the issues raised in written comments. The issues raised in comments will be addressed in the agency's rationale for its final rule, which will be published in the Federal Register and included in the rulemaking docket on Regulations.gov.

A commenter requested that Federal agencies sponsor at least one annual tribal consultation and recommends working with Tribal Governments at the local level when possible (i.e., regional offices of Federal agencies regularly engaging with tribes so issues can be resolved locally with individual tribes). Another commenter suggested holding periodic check-in consultations, in addition to the annual consultations, budget consultation, and planning meetings prior to consultations.

The Department recognizes tribal officials have limited resources to participate in the numerous tribal consultations by Federal agencies. To be mindful of the time needed to participate, the Department will conduct tribal consultation on any proposed rule with tribal implications. Most of the Department's programs have regional and district staff who engage with tribes, and OSHA agrees that addressing local issues through local or



regional engagement can be useful. Agency leadership is regularly informed of issues with tribal implications, including regional or more local issues.

Several commenters recommended that DOL budget requests include funding to support tribal consultation, so that tribal nations can use funds to fully participate in consultations. This means remunerating tribes for the costs of providing access to technical expertise, attending consultations, conducting studies, and producing reports. The Department notes that tribal consultation sessions are conducted virtually or in person, and all technical assistance requests received by the Department from tribal officials are free of charge.

Several commenters requested that all information be provided in Federal Register notices and that notices are ensured to reach tribal leaders at every affected tribe. When an agency sends notice to a tribe for consultation, it should provide sufficient background information about the proposed action, outline the process by which the agency will consult with tribes, and include a timeline.

The Department appreciates this comment and plans to announce future tribal consultation meetings in the Federal Register.

A commenter proposed allowing tribes to initiate consultation rather than making them wait for agencies to initiate.

The Department agrees with this comment and welcomes tribes to initiate consultation with the Department by directing all inquiries related to tribal consultation to [TribalConsultation@dol.gov](mailto:TribalConsultation@dol.gov).

Several commenters recommended providing various communication options for consultation, including face-to-face dialogue, written communication, telephonic communication, and video teleconferences to allow tribal leaders with a wide array of opportunities to participate in the consultation process. A commenter suggested including live-stream of in-person consultations or holding separate in-person consultations and

virtual consultations and giving tribes the option to attend whichever format they prefer. The commenter also requested recording consultations and making transcripts available so if tribes are unable to attend, they can refer to recordings.

Depending on the nature of the tribal engagement or consultation, meaning it has implications for all tribes, tribes in a certain region, or is comprised of a small group of tribal grantees, the Department will determine the most efficient method for conducting engagement and consultation. In most cases, DOL will conduct a hybrid meeting to ensure options for attending virtually or in person. The Department will also accommodate all individuals who need assistance in participating. Advanced notice will be given if the Department plans to record an engagement or consultation session.

A commenter proposed implementing a certification process at completion of consultation whereby both parties agree that meaningful consultation occurred.

The Department notes that there are no requirements in E.O. 13175 or the 2021 Presidential Memorandum for certifying a consultation session. The Department will create a record of the consultation session, including the tribal officials, their input, and the Department's response.

#### **E. Section V—Amendments to Specific Acts, Laws, or Programs**

Several commenters asked that DOL, and the Employee Benefits Security Administration (EBSA) in particular, work in good faith with tribes instead of effectively regulating by conducting enforcement actions without tribal input. DOL should not use the “enforcement exception” in its current policy to render the entire policy optional. The commenters requested a review of DOL's litigation position in *White Mountain Apache Tribe v. EBSA*, CV 20-1409, in which EBSA has posted that there is no need to consult with tribes in defining essential governmental functions or tribal commercial activities. The Department believes is a matter that is outside the scope of revising the tribal consultation policy.

A commenter asked that the current Memorandum of Agreement (MOA) be amended to comply with statutory provisions of Public Law 115-93 Indian Employment, Training and Related Services Consolidation Act of 2017. Additionally, the commenter would like funding for tribes to build tribal capacity on DOL programs with the MOA provision.

The Department notes that since the time of this comment, the Department of Interior's Bureau of Indian Affairs initiated discussions with tribes and Federal agencies, and renegotiated the MOA that implements the Indian Employment, Training and Related Services Consolidation Act of 2017. See

[https://www.bia.gov/sites/default/files/dup/inline-files/477\\_moa\\_signed.pdf](https://www.bia.gov/sites/default/files/dup/inline-files/477_moa_signed.pdf).

A commenter would like consultation to be a procedural guarantee for tribes, where there should be a dispute resolution process other than litigation.

The Department will follow the guidance outlined in E.O. 13175, the 2021 Presidential Memorandum, OMB, and the Federal Register guidance.

A commenter suggested looking to other DOL programs in addition to DINAP that can be included in DOI's 477 Plan.

The Department notes that tribes may currently request the inclusion of other DOL programs in the Department of Interior's "477 Plan" under the Indian Employment, Training and Related Services Consolidation Act of 2017. The Department of Interior's Bureau of Indian Affairs led discussions with Tribes and Federal agencies to reconsider the MOA that implements that Act. The revised MOA streamlines plan approval procedures and re-affirms the decisional authority of the Secretary of the Interior in approving plans and is available at [https://www.bia.gov/sites/default/files/dup/inline-files/477\\_moa\\_signed.pdf](https://www.bia.gov/sites/default/files/dup/inline-files/477_moa_signed.pdf).

A commenter requested that agencies respect the Division of Indian and Native American Programs (DINAP) structure and give weight to policy recommendations that arise from it.

The Department notes that as a part of DOL, DINAP regularly provides information to senior officials within the Department where necessary and applicable.

Several commenters asked DOL to consider how E.O. 13175, Section 3 can be better operationalized and consistently applied throughout the Federal Government. They would like any ambiguities in law to be interpreted in favor of tribal nations.

The Department's Tribal consultation policy addresses how DOL implements E.O. 13175, but DOL also participates in the White House Council on Native Affairs which includes as one of its goals consistent interactions with tribal nations across the Federal Government.

A commenter suggested revisiting E.O. 13175, Section 6, which encourages the Federal Government to facilitate and streamline tribal applications for waivers of statutory and regulatory requirements. This section should be more actively implemented across the Federal Government.

The Department will promptly review any waiver request submitted by a Tribal Nation where the relevant statute or regulation allows for such waivers. Certain laws that DOL administers, such as the Workforce Innovation and Opportunity Act, include a specific waiver provision.

A commenter requested the modification of requirements of the Youth Build program to allow grantees to focus on target populations within geographies, rather than on geography demographics as a factor. The current requirements have limited their tribe's ability to deploy the program in their community because the people they serve are spread out throughout the geography, which may or may not meet economic guidelines.

The Department will take this into consideration, alongside the statutory and regulatory requirements for the Youth Build program including work sites and supervision. All grant requirements for Youth Build are described in Funding Opportunity Announcements published on [www.grants.gov](http://www.grants.gov).

A commenter would like increased assistance with developing pre-apprentice & apprenticeship programs for in-demand jobs, e.g., growing fields in health care and home care for aging populations.

The Department's Office of Apprenticeship (OA) has been working with tribes throughout the United States to expand apprenticeship opportunities for Native Americans. OA also held a listening session for tribes on registered apprenticeships in 2021. OA encourages tribes and Tribal Organizations to contact our office and to visit [apprenticeship.gov](https://www.apprenticeship.gov) for assistance and information with setting up pre-apprenticeships and apprenticeships programs for health care and other industries. ETA has also announced plans to issue a Funding Opportunity Announcement (FOA) this year that includes a focus on youth apprenticeship, equity/pre-apprenticeship partnerships, and apprenticeship HUBs that provide an opportunity for tribes and Tribal Organizations to seek funding for pre-apprenticeship and Registered Apprenticeship programs.

#### **F. Section VI— Other Demands**

Several commenters would like a Tribal Advisory Committee to be established at the Secretariat level, tasked with ensuring that Federal agencies properly incorporate considerations of Indian Country as they execute their duties. This committee should advise the head of agency on how agency activities impact Tribal Governments and ensure inclusion of Tribal Governments in relevant policy proposals. Committee should consist of representatives from each region of the United States so the agency understands the unique needs of different tribes. The names and contacts of the individuals on this Advisory Council should be published.

The Department notes that in November 2022, the Department of the Interior Secretary announced the launch of its Secretary's Tribal Advisory Committee.

One commenter requested that data on Alaska Native and American Indian labor force participation and unemployment be presented monthly to the President, Congress, and

Federal agencies and released to the public as part of the same document DOL releases for all other ethnic groups.

The Department notes that the Bureau of Labor Statistics publishes monthly labor force data from the Current Population Survey by races and ethnicity where sample sizes are large enough to produce statistically accurate estimates. Effective with the release of January, 2022, data in February, 2022, employment status data on American Indians and Alaska Natives were produced on a monthly and quarterly basis. BLS produces a more detailed race and ethnicity report yearly based on a larger or aggregated sample.

A commenter recommended preparing for consultation that must be accelerated due to emergency legislation.

The Department makes every effort to provide sufficient time for consultation and recognizes there are situations when consultation sessions must be scheduled with short notice.

A commenter would like DOL to allow tribes the opportunity to discuss how DOL intends to carry out the American Jobs Plan.

The Department notes that since the time of this comment, Congress passed the Bipartisan Infrastructure Act, the CHIPS and Science Act, and the Inflation Reduction Act, all of which invest in U.S. infrastructure, manufacturing, and the economy. The Department of Labor has collaborated with other Federal agencies to set clear priorities for the good jobs created by these investments to benefit all Americans, particularly historically marginalized populations. The Departments of Labor and Commerce developed Good Jobs Principles that are shaping Federal investments and their implementation; see <https://www.dol.gov/general/good-jobs/principles>.

A commenter would like DOL to advise tribes of upcoming funding opportunities that may benefit them and provide technical assistance in completing the application process,

e.g., a Federal-Tribal partnership on data quality to publish an Indian Labor Force Report, a Youth Build funding opportunity.

The Department launched a new website for Grant opportunities at

<https://www.dol.gov/grants> that advises the public of upcoming funding opportunities.

The Department also held a webinar on April 13, 2023, *Preview of DOL Grants - Spring 2023: Learn What is Available to Tribes and Tips for Applying*.

A commenter requested that the Native American Employment and Training Council be elevated to the Secretary's Office, as is the case with the Secretary's Tribal Advisory Committee at HHS.

The Department notes that the Native American Employment and Training Council, like all committees organized under the Federal Advisory Committee Act, currently reports to the Secretary of Labor. Pursuant to Workforce Innovation and Opportunity Act Section 166(i)(4)(C), the purpose of the Council is to advise the Secretary on the operation and administration of the Indian and Native American programs authorized under Section 166 of WIOA. In addition, the Council advises the Secretary on the implementation of other programs providing services to Indian and Native American youth and adults under WIOA.

A commenter requested that Federal contractors notify tribes of upcoming projects and employment opportunities for tribal members that are within their usual and accustomed boundaries.

The Department notes that the Office of Federal Contract Compliance Programs (OFCCP) holds those who do business with the Federal Government (contractors and subcontractors) responsible for complying with the legal requirement to take affirmative action and not discriminate on the basis of race, color, sex, sexual orientation, gender identity, religion, national origin, disability, or status as a protected veteran. Prime

contractors should notify tribes of the upcoming projects during the pre-construction bid process.

#### **G. Section VII – Comments Beyond the Scope of the E.O. and Tribal Consultation Policy**

DOL values the input from tribal representatives and will address comments and suggestions outside the scope of the revised DOL Tribal Consultation Policy in this section.

A commenter suggested modernizing treatment of tribes and tribal programs authorized under the Workforce Innovation and Opportunity Act. Specifically, agencies should request full funding needs for tribal programs rather than relying on outdated numbers and streamline reporting requirements for non-477 tribal grantees.

The Department believes this is beyond the scope of the E.O. and the tribal consultation policy. However, the Department requested increased funding from Congress in the FY 2022, 2023, and 2024 Budgets for the Workforce Innovation and Opportunity Act Indian and Native American (INA) Program.

A commenter asked that DOL inform tribes of the appropriations plan for the Workforce Innovation and Opportunity Act for fiscal years that start in 2022 and DOL's plan to update the funding formula for appropriations based on the most recent census.

The Department believes this is beyond the scope of the E.O. and the tribal consultation policy. The Administration informs all members of the public on requested levels of appropriation annually in the Congressional Budget Justification, available at [www.dol.gov/budget/](http://www.dol.gov/budget/). The Department is also working with the Bureau of the Census to obtain updated population information for calculating the INA formula, in consultation with the Native American Employment and Training Council. The Department is also working with the Bureau of the Census to obtain updated population information for



calculating the INA formula, in consultation with the Native American Employment and Training Council.

A commenter suggested coordinating among agencies to ensure that multiple tribal consultations are not scheduled at the same time. Consider holding consultations during tribal gatherings like conferences and summits when large number of tribal representatives are gathering.

The Department recognizes the time and resources required for one tribe to participate in simultaneous consultation sessions. The WHCNA and NCAI have created websites to post tribal consultations and briefing sessions to ensure overlap does not occur. DOL is also looking for opportunities to participate in Tribal consultations hosted by other Federal agencies, and the American Indian Higher Education Consortium.

## **II. Final Tribal Consultation Policy**

### **U.S. Department of Labor**

#### **TRIBAL CONSULTATION POLICY**

##### **I. Background and Purpose**

A. Executive Order 13175 and the Department of Labor's Relationship with Indian Tribes

B. Referenced Authorities

##### **II. Guiding Principles**

A. Government-to-Government Relationship and Tribal Self-Determination

B. Open Communications and Respect for Cultural Values and Traditions

C. Ensuring Consultation is Meaningful

##### **III. Policy Statement**

A. Departmental Consultation Policy Generally

B. Implementation Responsibilities of DOL Operating Agencies

##### **IV. Regulations**

##### **V. Unfunded Mandates**

VI. Flexibility and Waivers

VII. Consultation Process Guidelines

VIII. Performance and Accountability

IX. Designated Officials and Points of Contact

A. Designated Departmental Official

B. Point of Contact for Each DOL Agency

X. Definitions

XI. Supplemental Terms and Effective Date

Appendix A—Executive Order 13175

## **I. Background and Purpose**

### **A. Executive Order 13175 and DOL's Relationship with Indian Tribes**

The United States has a unique legal and political relationship with Indian Tribal Governments, established through and confirmed by the Constitution of the United States, treaties, statutes, Executive orders, and judicial decisions. In recognition of that special relationship, pursuant to Executive Order 13175 of November 6, 2000, executive departments and agencies are charged with engaging in regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications and are responsible for strengthening the government-to-government relationship between the United States and Indian Tribes.

The Department of Labor (DOL) has collaborated extensively with American Indians and Alaska Natives (AI/AN) for many years in advancing its mission of fostering job opportunities, improving working conditions, and assuring work-related benefits and rights of workers and retirees in the United States. In recent years, senior DOL officials have conducted many site visits in Indian country and regularly engage with Indian tribes and their representatives, including the National Congress of American Indians. The Department's collaboration with Indian tribes encompasses a broad range of DOL matters

affecting tribes, including joint efforts to improve tribal program management, rulemaking, regulations, policies, waivers and flexibility, grant programs, contracting opportunities, and regulatory guidance.

The Department's Employment and Training Administration (ETA), for example, regularly includes Indian and Native American entities as eligible for employment and training programs, which can improve tribal economic self-sufficiency by ensuring that tribal workers have the skills to build and operate new infrastructure and facilities at the tribal community level and facilitate the creation of new business opportunities in Indian country. ETA's Division of Indian and Native American Programs (DINAP) administers employment and training services grants to tribal communities in ways that are consistent with the traditional cultural values and beliefs of the people they are designed to serve, including youth and at-risk populations facing employment barriers. ETA works closely with the Native American Employment and Training Council (NAETC), a Federal advisory committee comprised of representatives of Indian tribes, tribal organizations, Alaska Native entities, Indian-controlled organizations serving Indians, or Native Hawaiian organizations appointed by the Secretary of Labor. The NAETC provides advice to the Secretary regarding the overall operation and administration of tribal programs authorized under section 166 of the Workforce Innovation and Opportunity Act, as well as the implementation of other DOL Tribal programs and services.

The Department's Women's Bureau (WB) develops policies and standards and conducts inquiries to safeguard the interests of working women; to advocate for their equality and economic security for themselves and their families; and to promote quality work environments. It has ongoing relationships with organizations that represent Native American women. The WB is also part of a network of Native American women organizations that collaborate on finding ways to end domestic violence and abuse.

The Department's Office of Federal Contract Compliance Programs (OFCCP) works with Federal contractors to expand recruitment and employment opportunities to AI/ANs by linking contractors with tribal workforce development and Tribal Employment Rights Organizations (TERO).

The Department's Office of Disability Employment Policy (ODEP) provides national leadership on disability employment policy by developing and influencing the use of evidence-based disability employment policies and practices, building collaborative partnerships, and delivering credible data designed to improve the employment outcomes for people with disabilities. It has partnered with tribal colleges and universities to advance the rights of individuals with disabilities. ODEP has partnered with OFCCP to develop a series of webinars focused on providing resources and tools to boost recruitment, hiring, and retention of underrepresented groups, including people with disabilities in employment. The targeted audience includes tribal entities, Federal contractors, employers, workforce boards, community-based organizations, and related stakeholder groups. The ODEP-sponsored technical assistance provider, "National Center on Leadership for the Employment and Economic Advancement of People with Disabilities" (LEAD Center), in collaboration with the Employment Training Administration's (ETA) Division of Indian and Native American Programs (DINAP), will host two webinars focused on promising practices to assist DINAP grantees better serve program participants with disabilities.

The Department's Wage and Hour Division (WHD) regularly engages with Tribal Governments, tribal communities, and other tribal stakeholders, including, recently, as a part of the Essential Worker, Essential Protections initiative. WHD's past experiences make clear that outreach to tribal officials and tribal stakeholder's play an important role in WHD policy initiatives. Many of WHD's regulatory and sub regulatory actions affect the public at large without a particularized impact on Tribal governments; nonetheless,

WHD recognizes the importance of engaging Tribal Governments and other tribal entities and stakeholders in these processes. Additionally, WHD welcomes tribal officials to submit input and engage in dialogue with staff on policies they believe may have tribal implications. WHD anticipates conducting outreach to tribal officials and other stakeholders on a variety of regulations, sub regulatory guidance, and other policies, including, for example, the modernization of the Davis-Bacon and Related Acts, overtime regulations, misclassification, and the implementation of the Bipartisan Infrastructure Law, as well as the CHIPS and Science Act. As WHD works towards its goal of promoting equity and reducing barriers to accessing WHD resources for historically marginalized groups, including Native Americans, WHD will continue to work with Tribal Governments and stakeholders to ensure that their concerns over preserving their culture, traditions, lands, and sovereignty are addressed in an inclusive manner.

The Department's Occupational Safety and Health Administration (OSHA) has interacted with tribal communities mostly through enforcement operations. However, efforts are underway to provide training, compliance assistance and consultative services with tribal entities that are interested in learning about the laws OSHA enforces. OSHA is also looking forward to designating compliance assistance staff members to work directly with tribes. The goal is to have a dedicated point of contact for tribes, to share more on OSHA's compliance assistance and cooperative programs, and to develop a good working relationship with tribal leaders before any enforcement action may occur.

OSHA's cooperative engagements to promote safety and health in tribal workplaces and communities could serve as models for other OSHA regions to replicate over the next year. For example, the Arizona OTI Ed Center has had a longstanding relationship with the Navajo Nation and has received Harwood grant funding in the past to develop safety and health trainings geared towards tribal workers and employers. The Navajo Nation's Safety and Health division has used the Ed Center as a technical resource, taking classes

offered and collaborating on providing 10- and 30-hour OSHA certification trainings to interested workers and employers. In Nebraska, OSHA engages with tribal communities through its On-Site Consultation program and a partnership with the Wichita Area Office. Nebraska's Department of Labor administers OSHA's On-Site Consultation program and has engaged with TCUs to provide consultation services. Before the COVID-19 pandemic, OSHA's Wichita Area Office participated in local Tribal Safety and Health Fairs.

The Department's Mine Safety Health Administration (MSHA) created specific bilingual positions in (English/Spanish and English/Navajo) to enhance mining community's safety and health needs through improved outreach and communication. This will be standard hiring policy for all future hires (FY 2022 -FY 2023) in specific regions such as the Western U.S. where there is a predominantly Hispanic and American Indian mining community. In FY 2021, MSHA participated in outreach to minority serving higher education institutions (HBCUs, HSIs and TCUs) for hiring and it also participated in DOL WebEx activities to teach individuals how to apply for Federal jobs. Further, MSHA hosted virtual informational events with DOL focusing on Q&A sessions to attract individuals from HBCUs, HSIs and TCUs to learn more about MSHA.

Additionally, MSHA is working on an outreach plan for the Navajo Nation on the topic of non-miner related Black Lung cases, which are extremely high in the population.

The Department's Veterans' Employment and Training Service (VETS) top priorities are (1) getting the military-to-civilian transition right, (2) leveraging the right strategic partnerships to maximize employment outcomes, and (3) advancing equity and inclusion in our underserved veteran communities. VETS is taking a new and proactive approach by reaching out to underserved communities, especially Native American and Alaska Native veterans, who have not traditionally engaged with DOL and other segments of the Federal Government at the same rate as other veteran communities. By engaging with

new partners, we will increase awareness of VETS programs and work towards removing barriers to equitable access. VETS is also continuing to improve its data maturity to strengthen the analytical capabilities needed to better serve and publicly report outcomes for historically excluded and underserved veterans. While excellent work has been done to support transitioning service members, veterans, and military spouses within tribal communities, VETS recognizes that there is always more work to do. VETS is consistently reviewing its programs to determine areas where the Agency can improve customers' experiences and employment outcomes and ensure that Native American and Alaska Native veterans are able to access our services.

These are among many of DOL's ongoing actions to engage with tribes and support the efforts of Tribal Governments to have sustainable tribal communities and achieve our mutual goals of ensuring fair wages, employee rights, and workplace safety while working to alleviate the high unemployment found on tribal lands. The Department is committed to building on these efforts to engage in regular and meaningful consultation and collaboration with tribal officials on policies and actions that have tribal implications, including the development of this formal tribal consultation policy. Accordingly, this policy has been developed in consultation with Indian tribes and tribal officials as set forth in Executive Order 13175.

Implementation of this tribal consultation policy will facilitate greater consistency across the DOL in carrying out tribal consultations and will improve collaboration with Indian tribes at all levels of departmental organizations and offices. This policy will also ensure that a reporting structure and process is in place so that all departmental tribal consultation work will be transparent and accountable. DOL employees having responsibility for the outcomes of consultation and collaborative activities will be better able to assess effectiveness and coordinate their efforts with other related departmental initiatives. Through these efforts, the Department anticipates an even stronger

relationship with Indian tribes and improved program delivery to meet the needs of Indian tribes and communities.

## **B. Referenced Authorities**

This Tribal consultation policy document was developed based upon:

1. Indian Self-Determination and Education Assistance Act, Public Law 93-638, as amended (25 U.S.C. 5301-5310).
2. Native American Programs Act of 1974, (42 U.S.C. 2991-2992, as amended).
3. Consolidated Appropriations Act of 2005, Public Law 108-447.
4. Executive Order (E.O.) 12866, Regulatory Planning and Review, September 30, 1993.
5. Presidential Memorandum, Government-to-Government Relations with Native American Tribal Governments, April 29, 1994.
6. Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, November 6, 2000.
7. Presidential Memorandum, Government-to-Government Relationship with Tribal Governments, September 23, 2004.
8. Presidential Memorandum, Tribal Consultation, November 5, 2009.
9. OMB Memorandum M-10-33, Guidance for Implementing Executive Order 13175, July 30, 2010.
10. Presidential Memorandum, Tribal Consultation and Strengthening Nation-to-Nation Relationships, January 26, 2021.
11. Presidential Memorandum, Uniform Standards for Tribal Consultation, November 30, 2023.

## **II. Guiding Principles**

### **A. Government-to-Government Relationship and Tribal Self-Determination**

The United States, in accordance with treaties, statutes, Executive orders, and judicial decisions, has recognized the right of Indian tribes to self-government and maintains a



government-to-government relationship with federally recognized tribes. Indian tribes exercise inherent sovereign powers over their members and territory. The Federal Government has enacted numerous statutes and promulgated numerous regulations that establish and define a trust relationship with Indian tribes. Based on this government-to-government relationship, DOL will continue to work with Indian tribes on its programs involving tribes in a manner that respects tribal self-government and sovereignty, honors tribal treaty and other rights, and meets the Federal Government's tribal trust responsibilities.

#### **B. Open Communications and Respect for Cultural Values and Traditions**

Communication and the exchange of ideas will be open and transparent. Department officials will respect the cultural values and traditions of the tribes. To ensure efficiency and avoid duplicative efforts, DOL will work with other Federal departments to enlist their interest and support in cooperative efforts to assist tribes to accomplish their goals within the context of all DOL programs.

#### **C. Ensuring Consultation Is Meaningful**

The Department is committed to ongoing and continuous dialogue with Indian tribes, both formally and informally, on matters affecting tribal communities. Consultation is a critical ingredient of a sound and productive Federal-tribal relationship that emphasizes trust, respect, and shared responsibility. Engaging with tribes and building relationships with tribal officials have improved the Department's policy toward Indian tribes on a broad range of DOL matters. The Department is committed to further improving its collaboration with Indian tribes and creating additional opportunities for input from all affected tribal communities. Consultation that is meaningful, effective, and conducted in good faith makes the Department's operation, decision making, and governance practices more efficient.

### **III. Policy Statement**

## **A. Departmental Consultation Policy Generally**

In accordance with Executive Order 13175, when formulating and implementing policies that will have tribal implications, it is the Department's policy that, to the extent practicable and permitted by law, consultation with affected Indian tribes will occur. As stated in the Executive order, this refers to proposed legislation, regulations, policies, or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

## **B. Implementation Responsibilities of DOL Operating Agencies**

Each DOL operating agency will have an accountable process to ensure meaningful and timely input by Indian tribes on policies or actions that have tribal implications. With respect to DOL programs administered by Indian Tribal Governments, operating agencies will grant Indian Tribal Governments the maximum administrative discretion permissible consistent with applicable law, contracting requirements, and grant agreements, and will defer to Indian tribes to develop their own policies and standards where legally permissible. The Department's operating agencies will review their existing tribal consultation and/or program administration practices, including those of their regional offices, and revise them as needed to comply with the Department's policy as set forth in this document. If DOL agencies require technical assistance in conducting consultations, the designated departmental official's office (see section IX below) can provide and/or coordinate such assistance.

## **IV. Regulations**

In accordance with Executive Order 13175, to the extent practicable and permitted by law, prior to the promulgation of any regulation that has tribal implications and preempts tribal law, the DOL agency involved will:

1. Notify and consult with affected Indian tribes early in the process of developing the proposed regulation consistent with the Administrative Procedure Act (5 U.S.C. 551 *et seq.*), Executive Order 12866, and Executive Order 13563, and ensure that the tribes are informed about opportunities to participate in stakeholder meetings and public forums about which they might not otherwise be aware;
2. Provide a tribal summary impact statement in a separately identified portion of the preamble to the regulation as it is to be issued in the **Federal Register**, which consists of a description of the extent of the agency's prior consultation with Indian tribes, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which tribal concerns have been met; and
3. Make available to the Secretary any written communications submitted to the agency on behalf of a tribe.

On issues relating to tribal self-governance, tribal self-determination, and implementation or administration of tribal programs, each DOL agency will make all practicable attempts where appropriate to use consensual mechanisms for developing regulations.

For any draft final regulation that has tribal implications that is submitted to the Office of Information and Regulatory Affairs for review under E.O. 12866, the agency will certify that the requirements of Executive Order 13175 have been met.

## **V. Unfunded Mandates**

In accordance with Executive Order 13175, no DOL agency shall promulgate any regulation that is not required by statute and imposes substantial direct compliance costs on tribal communities, unless:

1. Funds necessary to pay the direct costs incurred by Indian tribes in complying with the regulation are provided by the Federal Government; or
2. Prior to the formal promulgation of the regulation, the agency:

- a. Consulted with Indian tribes early in the process of developing the proposed regulation;
- b. In a separately identified portion of the preamble to the regulation as it is to be issued in the **Federal Register**, provides to the Director of the Office of Management and Budget a description of the extent of the agency's prior consultation with representatives of affected Indian tribes, a summary of the nature of their concerns and DOL's position supporting the need to issue the regulation; and
- c. Makes available to the Director of the Office of Management and Budget any written communications submitted to DOL by such Indian tribes.

## **VI. Flexibility and Waivers**

With respect to statutory or regulatory requirements that are discretionary and subject to waiver by DOL, each DOL agency will review the processes under which Indian tribes apply for waivers and take appropriate steps to streamline those processes as necessary.

When reviewing any application by an Indian tribe for a waiver of regulatory requirements in connection with any program administered by a DOL agency, the agency will consider the relevant factors with a general view toward increasing opportunities for utilizing flexible policy approaches at the Indian tribal level in cases in which the proposed waiver is not inconsistent with the applicable Federal policy objectives and is otherwise appropriate as determined by the agency.

Each DOL agency will promptly render a decision upon a complete application for a waiver. The agency will provide the applicant with timely written notice of the decision and, if the application for a waiver is not granted, the reasons for such denial, including a citation to any relevant legal authority that provides a basis for the denial.

## **VII. Consultation Process Guidelines**

1. Notification. When a DOL agency or regional office determines that a proposed policy or action will have tribal implications, whether for an individual tribe, regionally, or

nationally, the DOL agency will have an affirmative responsibility to provide advance notice to the potentially affected Indian tribes at the earliest practicable time, but not less than 60 days prior to DOL's proposal, either through individual notice, established networks of communication, or Federal Register publication. An Indian tribe may initiate a request for consultation with DOL or a DOL agency on a DOL matter that it believes has tribal implications at any time by contacting that agency or the designated departmental official (see section IX), and the tribe should disseminate any DOL-provided information to its members by the method(s) it deems appropriate (e.g., U.S. mail, electronic mail, hard-copy handouts). With respect to rulemaking proceedings of general applicability that have no particularized impact on Indian tribes, DOL agencies may use the existing **Federal Register** notice and comment process to provide notice but should supplement this process with targeted outreach where appropriate.

2. Subjects of Consultation. To the extent consistent with applicable laws and administrative requirements, consultation can involve any DOL matter having Tribal implications, including but not limited to: Tribal program management, rulemaking, regulations, policies, waivers, and flexibility; grant programs; contracting opportunities; regulatory guidance; and other matters of Tribal interest. At the same time, DOL agencies should not create undue burdens on Tribes with respect to regulations or other matters that do not have Tribal implications. Routine matters, including normal DOL interactions with direct grantees such as monitoring, selecting grantees, and reporting requirements do not trigger further consultation processes under this policy. Enforcement policy, planning, investigations, cases, and proceedings are not appropriate subjects for consultation under this policy.

3. Initial Planning and Scoping. Following notification to affected Tribes that policies or actions have Tribal implications, the DOL agency or regional office, in conjunction with the designated departmental official's office, should engage with those Tribes on initial

planning and the appropriate scope of the consultation. Initial planning and scoping should include describing the nature and extent of the expected Tribal implications; identifying any time constraints or deadlines, relevant existing policies, and potential resource issues; and making a determination as to the most useful and appropriate consultation mechanism.

4. Consultation Mechanisms. The manner of consultation should be appropriate to the nature and complexity of the matter and can occur via mailings (e.g., for remote Tribes that may not have internet access), one or more face-to-face meetings or meetings via teleconference, roundtables, or other appropriate means and may include the use of electronic media and messaging and web site portals.

5. Conducting Consultations. When a consultation commences, DOL will solicit the views of the Indian tribes involved on the relevant subjects and issues. Consultation should involve a thorough examination of the subject at issue, including discussion of cultural, economic, and other impacts on tribal programs, services, functions, and activities; compliance guidance; programmatic and funding issues if relevant; any external constraints such as executive, judicial, or legislative actions; and any relevant technical or other regulatory issues as they affect tribes.

6. Frequency of Consultation Meetings. Consultation meetings may be scheduled on a regular basis or on an as needed basis except that at least one national tribal consultation meeting will be held by DOL each calendar year. For example, DOL agencies may establish a quarterly or semi-annual conference call with the tribes to consult with them on the regulatory proposals being considered by the agency and inform them about opportunities to participate in stakeholder meetings and public forums. To reduce costs, tribes and DOL agencies will make their best efforts to coordinate in person consultation meetings to coincide with other regularly scheduled meetings (such as multi-agency and association meetings and regional tribal meetings).

7. Submissions of Tribal Comments. The DOL agency involved in the consultation will communicate clear and explicit instructions on the means and time frames for Indian tribes to submit comments to DOL on the matter, whether in person, by teleconference, and/or in writing, and if appropriate will allow a reasonable period of time following a consultation meeting for tribes to submit additional materials. A written communication on the correspondence of the highest elected official, appointed tribal official, or other third-party designee of such authority (according to the procedures set forth under the definition of “Indian Tribes” in section X), will be considered by DOL to be the official position of the tribe on the subject at issue. If the DOL agency determines that the Administrative Procedure Act or other Federal law or regulation prohibits continued discussion at a specified point in the decision-making process, the agency will so inform the Indian tribes. With respect to rulemaking proceedings of general applicability that will have no unique impacts on Indian tribes, DOL agencies may use existing **Federal Register** notices, dockets, and comment periods to obtain tribal comments, but should supplement them with additional means of obtaining tribal input where appropriate.

8. Time Frames. Time frames for the consultation process will depend on the nature and complexity of the consultation and the need to act quickly. Suggested guidelines are as follows:

- a. The initial planning and scoping should normally take place at least 30 days before the date of the issuance of the notice of the proposed action;
- b. If a consultation meeting will occur, the meeting should normally be scheduled within 30 days of the completion of the planning and scoping;
- c. For consultations involving one or more meetings, the consultation process should normally be concluded within 60 days of the final consultation meeting; for consultations not involving meetings the consultation process should normally be concluded within 60 days of the planning and scoping.

Shorter time frames may be more appropriate in exigent situations, such as when a critical deadline is involved, or expanded as necessary for novel or highly complex matters.

9. Reporting of Outcome of Consultation to Tribes. The DOL agency involved in the consultation will report the status or outcome of the issue involved to the affected Indian tribes. And, to the extent that tribal input was not adopted, the agency will provide a written explanation for why such input was not adopted or incorporated.

10. Formation of Tribal Committees, Task Forces, or Work Groups. Based on the government-to-government relationship, consultation under this policy is generally with one or more individual Tribal Governments. In some cases, it may become necessary for DOL to form a tribal committee, task force, or work group to study a particular policy, practice, issue, or concern. Members of such committees or work groups will include representatives of federally recognized Tribal Governments or their designees with authority to represent their interests or act on their behalf. Tribal representation on such committees or work groups should consist of geographically diverse small, medium, and large tribes, whenever possible. Members of these committees or work groups shall make good faith attempts to attend all meetings which shall be open to the public and may establish member roles and protocols for producing their work and obtaining input and comment on it. All final work group products or recommendations will be given serious consideration by the Department. [See Section XI below on the Federal Advisory Committee Act (FACA) exemption for consultations undertaken with officials of federally recognized Tribal Governments pursuant to this Tribal consultation policy.]

11. Use of Existing Statutory Advisory Committees. DOL agencies may also use existing Tribal advisory committees such as the NAETC as part of meeting their consultation responsibilities under this policy to the extent otherwise permitted by law. If such an advisory committee is required by law to be used exclusively for a particular function or



purpose, consultation shall take place in accordance with the requirements of such committee and nothing in this policy requires any further consultation (see, e.g., 29 U.S.C. 2911(h)).

12. Submission of Comments by Other AI/AN Organizations. The primary focus of formal consultation activities under this policy is with representatives of federally recognized Indian tribes. DOL recognizes, however, that in some cases the consultation process would be negatively affected if other (non-federally recognized) AI/AN organizations lacking the government-to-government relationship were excluded. Accordingly, nothing in this policy prohibits other AI/AN organizations that are not representatives of Indian tribes from providing their views to the Department.

### **VIII. Performance and Accountability**

The consultation process and activities conducted under this policy should be accountable, transparent, and result in a meaningful outcome for the Department and for the affected Indian tribes. To enable the Department and the Indian tribes to effectively evaluate the implementation and results of this consultation policy:

1. DOL agencies will maintain records of each consultation and will document the status or outcome of each subject of consultation.
2. DOL agencies will, with input from Indian tribes, develop and utilize appropriate evaluation measures to assess their efforts to determine whether their overall consultation process is effective over time.
3. DOL agencies will report annually to the office of the designated Departmental official on the frequency, scope, and effectiveness of their consultation activities including any recommendations received from Indian tribes on ways to improve the consultation process.
4. The designated Departmental official's office will compile the reports of the agencies and prepare an annual DOL consultation report evaluating the overall effectiveness of

this policy which will be made available to the Indian tribes. The office will seek tribal feedback on the annual consultation report and consider any comments from Indian Tribes and Federal participants to determine whether DOL should make any amendments to this policy.

5. The designated departmental official's office will prepare and submit any reports required to be submitted to the Office of Management and Budget under Executive Order 13175 and the November 5, 2009, Presidential Memorandum.

## **IX. Designated Officials and Points of Contact**

### **A. Designated Departmental Official**

The designated departmental official to coordinate the implementation of this policy will be the Tribal Liaison within the Office of Congressional and Intergovernmental Affairs, or other departmental officials as designated by the Secretary.

The duties and responsibilities of the designated departmental official include: Serving as the Secretary's expert informational resource on Tribal matters; maintaining an overall understanding of Tribal concerns and issues as they relate to DOL programs and coordinating and managing the Secretary's policies for Indian Tribes; coordination of Tribal site visits for DOL executive leadership; serving as DOL's representative on interdepartmental working groups on Tribal matters; conducting periodic intradepartmental meetings and otherwise overseeing the implementation of the Department's Tribal consultation policy by DOL operating agencies; providing advice and assistance to DOL agencies and regional field offices on Tribal matters; and conducting outreach to national Tribal Government organizations.

### **B. Point of Contact for Each DOL Operating Agency**

Each DOL operating agency will designate a senior official as having primary responsibility for Tribal matters. The designated departmental official's office will maintain an up-to-date list clearly identifying the agency Tribal officials and their contact

information and this information will be made available to Indian Tribes. DOL agencies should also designate an alternate official to serve in the absence of the primary official. The duties of the agency officials having responsibility for Tribal matters include: Having and maintaining knowledge of this policy and the government-to-government relationships and sovereign status of Indian Tribes; serving as the primary liaison with Indian Tribes for their agency; ensuring the consultation responsibilities of their agencies are carried out, including those of their regional offices; and reporting to the administration in their respective agencies, as well as the designated Departmental official. Unless otherwise approved by the designated Departmental official, these responsibilities shall not be placed within the agency Offices of Civil Rights, as Tribal relations and consultations are treaty, trust, and government-to-government based, and are not a function of civil rights based on race.

## **X. Definitions**

For the purposes of this policy, the following definitions apply:

**American Indian and Alaska Native (AI/AN)**—A member of an American Indian or Alaska Native tribe, band, nation, pueblo, village, or community of indigenous peoples in the United States, as membership is defined by the Tribal community, including Native Hawaiians.

**AI/AN Organization**—An AI/AN organization or group having members that are not representatives of federally recognized Indian Tribal governments, such as state Tribes and members of urban AI/AN groups that are not located on Indian Tribal lands.

**Consultation**—An enhanced form of communication consisting of an open and free exchange of information and opinion among parties which emphasizes trust, respect, and shared responsibility. The consultation process enables mutual understanding, facilitates the effort to reach consensus on issues, and contributes to informed decision making.

**Deliberative Process Privilege**—A privilege exempting the Federal Government from disclosure of government agency materials containing opinions, recommendations, and other internal communications that are part of the deliberative process within the Department or agency.

**Department**—Means the U.S. Department of Labor.

**DOL Operating Agency**—A Department of Labor administration, agency, bureau, office, or division that: (1) Has operational responsibility for a Departmental program that has Tribal implications; or (2) has been designated by the Secretary to participate in this policy.

**Executive order**—An order issued by the Federal Government's executive on the basis of authority specifically granted to the executive branch (as by the U.S. Constitution or a Congressional Act).

**Indian Tribe**—An Indian or Alaska Native tribe that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994 (25 U.S.C. 5130), and with whom the Federal Government maintains a government-to-government relationship, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601-1613a). The Department of the Interior's Bureau of Indian Affairs maintains and regularly publishes the official list of federally recognized Indian Tribes which are generally established pursuant to a Federal treaty, statute, Executive order, court order, or a Federal administrative action making these Tribes eligible for certain Federal programs and benefits because of their status as Indians. A federally recognized Indian tribe may expressly delegate a third party to represent the tribe in all Tribal consultations with the Department of Labor, provided the Department is notified of such delegation in writing prior to the consultation. An Indian

tribe may rescind its delegation at any time, but the rescission should occur in writing, if practicable.

**Policies or Actions with Tribal Implications**—Refers to proposed legislation, regulations, policies, and actions that have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and the Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. This encompasses a broad range of DOL programs and activities targeted at Tribal Governments or having AI/ANs as participants including, but not limited to, Tribal program management, rulemaking, regulations, policies, waivers and flexibility; grant programs; contracting opportunities; regulatory guidance; or other DOL activities that would have a substantial direct effect on a tribe's traditional way of life, Tribal lands, Tribal resources, or the ability of the tribe to govern its members or to provide services to its members. This term does not include matters that are the subject of litigation or that are undertaken in accordance with an administrative or judicial order.

**Secretary**—Means the Secretary of Labor.

**Substantial Direct Compliance Costs**—Those costs incurred directly from implementation of changes necessary to meet the requirements of a Federal mandate.

Because of the large variation in resources among Tribes, “substantial costs” will vary by Indian tribe. Where necessary and appropriate, the Secretary will determine the level of costs that represent “substantial costs” in the context of an Indian tribe's resource base.

**To the Extent Practicable and Permitted by Law**—Refers to situations where the opportunity for consultation is limited due to practical constraints including time, budget, or other such reason, and situations where other legal requirements take precedence.

**Tribal Committee, Task Force, or Work Group**—A group composed of Indian Tribal officials or their designees with authority to represent their interests or act on their behalf that is formed to work on a particular policy, practice, issue, or concern. This can include

representatives of existing organizations representing federally recognized Tribes, such as the NCAI.

Tribal Officials—Tribal council members and delegates, chairpersons, or other elected or duly appointed officials of the governing bodies of Indian Tribes or authorized inter-Tribal organizations or their designees with authority to represent them or act on their behalf.

## **XI. Supplemental Terms and Effective Date**

1. Inapplicability of the Federal Advisory Committee Act (FACA). In accordance with section 204(b) of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4), the provisions of FACA are not applicable to consultations between the Federal Government and elected officers of Tribal Governments or their designated employees with authority to act on their behalf. Therefore, FACA is generally not applicable to consultations undertaken pursuant to this Tribal consultation policy. As the Office of Management and Budget stated in its guidelines implementing section 204(b):

2. This exemption applies to meetings between Federal officials and employees and Tribal Governments acting through their elected officers, officials, employees, and Washington representatives, at which 'views, information, or advice' are exchanged concerning the implementation of intergovernmental responsibilities or administration, including those that arise explicitly or implicitly under statute, regulation, or Executive order. The scope of meetings covered by this exemption should be construed broadly to include meetings called for any purpose relating to intergovernmental responsibilities or administration. Such meetings include, but are not limited to, meetings called for the purpose of seeking consensus, exchanging views, information, advice, and/or recommendations; or facilitating any other interaction relating to intergovernmental responsibilities or administration. (OMB Memorandum 95-20 (September 21, 1995), pp. 6-7, published at 60 FR 50651, 50653 (September 29, 1995)).

3. If, however, DOL were to form an advisory committee consisting of (non-federally recognized) AI/AN organizations or groups lacking the government-to-government relationship, the section 204(b) exception would not apply and all FACA requirements would need to be followed.

4. Reservation of Authorities. Nothing in this policy waives or diminishes the U.S. Government's rights, authorities, immunities, or privileges, including the deliberative process privilege. Among other things, internal communications on the development of proposed legislation, enforcement policy, and other internal policy matters are part of the deliberative process by the Executive Branch and will remain confidential. Nothing in this policy waives or diminishes any Tribal rights, authorities, immunities, or privileges including treaty rights and sovereign immunities, and this policy does not diminish any rights or protections afforded to individual AI/ANs under Federal law.

5. Disclaimer. This document is intended to improve the Department's management of its relations and cooperative activities with Indian Tribes. DOL has no obligation to engage in any consultation activities under this policy unless they are practicable and permitted by law. Nothing in this policy requires any budgetary obligation or creates a right of action against the Department for failure to comply with this policy nor creates any right, substantive or procedural, enforceable at law by a party against the United States, its agencies, or any person.

6. Effective Date. The Tribal Consultation Policy is effective October 10, 2023, and shall apply to all prospective actions taken by the Department as described herein.

Julie A. Su,

Acting Secretary, Department of Labor.

[FR Doc. 2023-28493 Filed: 12/26/2023 8:45 am; Publication Date: 12/27/2023]